THE LEGAL SYSTEM OF QUEBEC.[a]

The two great legal systems which between them divide the countries of Christendom, the civil law, derived from the law of Rome, and the common law, based on the customary law of England, are both represented in Canada.

In the Maritime Provinces of New Brunswick, Nova Scotia and Prince Edward Island the view adopted by the courts and declared by the Nova Scotia Act of 1759[1] is that these provinces were from the beginning English settlements and that there, as in the other American colonies, the colonists brought with them all the common and statute law of England applicable to their situation and condition at the time of the settlement.[2]

When Ontario, under the name of Upper Canada, was carved out of the old Province of Quebec, its first legislative act was to abrogate the French law within its territory and to substitute the laws of England as they stood on the 15th day of October 1792. In British Columbia, the other province created before Confederation, the English law was taken over as it existed on the 19th day of November 1858, while in Manitoba, Alberta, Saskatchewan, and the Yukon Territory the date of the reception of English law is the 15th July, 1870. In eight out of the nine provinces of Canada, therefore, the English law prevails, while the Province of Quebec is still governed by the civil law.

For an intelligent study of Canada and its provinces it is essential to bear in mind that Canada as a whole is not governed by one homogeneous body of laws. Accordingly in this article the history of the law of Quebec will be so far given as to make it clear in what respects that province possesses a legal system peculiarly its own.

It should, however, be stated at the outset that, though the law of Quebec differs from that of the other provinces, this is only partially true, since certain branches of the law are the same for all parts of the Dominion.

In the first place, the criminal law of the whole country is the criminal law of England. The French criminal law which was in

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a. This article is to be incorporated in a work by many collaborators to be entitled "Canada and Its Provinces."

[1] 33 Geo. II c. 3.

[2] Uniacke *v.* Dickson (Nova Scotia 1848) James' Rep. 287; The Queen *v.* Porter (1888) 20 Nova Scotia 352.

force under the old *régime* was abrogated by the conquest *ipso facto,* or, if there is any doubt upon that point, was abolished by Murray's Ordinance of 1764. Before Confederation it was of course competent for any province to make by statute such modifications as might be desirable. The criminal law was, however, removed altogether from the legislative jurisdiction of the provinces by the confederation statute which transferred it bodily to the Parliament of the Dominion. Since then it has been codified by the Criminal Code of Canada, which came into force on July 1st 1893, and has since undergone a complete revision. It must not be forgotten, nevertheless, that in principle the English criminal law *en bloc* was introduced into Canada at the Cession or by General Murray, and that the Criminal Code does not repeal the whole of the old criminal law. Acts which are criminal by what may be called the criminal common law of England are still punishable in Canada unless it has been otherwise declared in express terms or by reasonable implication in Canadian legislation. For example the offence of champerty is still known to the law though the Criminal Code does not mention it.[3]

In the second place, it is generally agreed that there are certain rules of law and especially certain rights and privileges of the subject which belong to public and not to private law. As a part of the constitutional law of the British Empire they are the same in all portions of it, and therefore the same in the Province of Quebec as in the rest of Canada. It can hardly be disputed for example that such charters of liberty as Magna Charta or the Bill of Rights formed a part of the law of Quebec as soon as the English sovereignty was introduced. It will be necessary to return to this matter, especially since the line of demarcation between public and private law is in some cases by no means easy to draw. For the moment it is sufficient to state that where a question is one which belongs to the public law it is the law of England which must supply the governing principle; and upon such matters the law of Quebec does not differ from that of Ontario or of any other province of Canada.

Thirdly, there is a large and important group of subjects with which the legislature of Quebec would have been competent to deal—subjects in regard to which the law of Quebec was or might be different from that of the other provinces—which were by the

[3]Meloche *v.* Déguire (1903) 34 Can. S. C. R. 24; The King *v.* Cole (1902) 5 Can. Crim. Cases 330.

British North America Act 1867, transferred to the Parliament of the Dominion, called into existence by that statute. Most of these subjects, for example Bills of Exchange, Naturalisation, Banks and Patents, have been dealt with by federal statutes of a codifying character.

When we speak of the law of Quebec therefore, as a peculiar and separate legal system, we refer entirely to those parts of that law which do not belong to the criminal law, to public law, or to any subject which belongs to federal authority. In other words it is the law of "property and civil rights" to use the time-honoured formula; but subject to the reserve that some of the subjects formerly covered by that expression were by the Act of 1867 taken away from the provincial control and handed over to the federal parliament. A brief indication of what these transferred subjects are will be given later.

The law of property and civil rights which is peculiar to the Province of Quebec has, to a large extent, been codified in the Civil Code of Lower Canada,[4] and in the Code of Civil Procedure the latest revision of which was in 1897. With the exception of the mercantile law, of which an outline is given in the Civil Code, that code corresponds in form and contents somewhat closely to the *Code Civil Français,* formerly designated as the *Code Napoléon.*

The mercantile law of the Province of Quebec stands in a somewhat peculiar position and it will be necessary to say a few words about it at a subsequent stage.

As to the Code of Civil Procedure, with which we are not here specially concerned, it may be said in passing that it is not drawn from French sources to anything like the same extent as the Civil Code. The Commissioners who codified the rules of procedure included remedies, such as writs of injunction, mandamus and prohibition, which our courts had taken from the English practice, and owing to the differences in the judicial systems of England and France and to other causes, it is probably true that the Code of Civil Procedure is composed to the extent of one half or more of rules of English origin.

From what has already been said it will be seen that the special rules of law peculiar to the Province of Quebec are to be found mainly in the Civil Code of Lower Canada, in the old law so far as this has not been abrogated by the Code, in the provincial statutes and in the decisions of the courts.

[4]This Code came in force in 1866 before Confederation and still bears the old name of the Province.

It is now time to explain how it comes about that this peculiar system of law remains in force in a country which forms part of the British Empire.

Before the French Revolution and the great work of codification to which Napoleon gave his name, France was not governed by a uniform system of law. The country was divided into a great number of districts of varying size, each of which had a customary law of its own, officially edited and printed as a *Coutume*. The royal *Ordonnances,* which correspond to modern statutes, were as a rule, it is true, made to apply to the whole of France. Moreover upon many matters, and among them some of the most important, such as obligations, the *Coutume* as a rule threw little or no light. When questions arose as to which the *Coutume* was silent the judges had to fall back upon the Roman law, or, more correctly, upon the Roman law in the shape which it had gradually assumed in the writings of modern civilians. The commentaries of these writers formed, as it were, a reservoir or body of supplementary law from which the judges drew as occasion required.

Among the numerous French *Coutumes,* that of the Capital—the Custom of Paris—had long enjoyed a kind of pre-eminence. In the French colonies it was impossible merely to declare that French law should prevail, since French law was not the same in all parts of France. It was necessary to select a particular *Coutume* and declare that it should apply to the colony, and it was quite natural that in the French colonies the Custom of Paris should be the one to be so selected. The edict of 1663 which set up the Conseil Supérieur, the first judicial and administrative body in Quebec, declared that the council was to decide matters according to the Custom of Paris.[5]

In Quebec, the general ordinances, by which the Custom of Paris had been modified prior to 1663, likewise formed a part of the law, unless they were manifestly intended to refer to France only and the local conditions in the province were such as to make them clearly inapplicable. Moreover, just as in France, the writings of the civilians were referred to for guidance upon doubtful matters. During the period of French rule in Canada, and particularly under Louis XIV, a number of important ordinances were issued in France which codified certain branches of the law, such as the commercial law and the law of wills. There has always

[5]Edits et Ordonnances v. 1 p. 37.

been a difference of opinion as to whether these ordinances applied to Canada as well as to France.

On the whole, the better opinion appears to be that before a French ordinance, subsequent to 1663, took effect in Canada it required to be registered by the Superior Council at Quebec.[6] Many of the ordinances were not so registered, and therefore, upon this view they were not and are not now as such a part of the law of Quebec. The question is of less practical importance than might at first appear because the ordinances did not make many radical changes but were on the whole consolidations of the old law which was itself in operation in Quebec. In the province, ordinances modifying the law upon certain points were issued by the administrative authorities, more particularly by the great official called the Intendant, and in course of time there grew up also a considerable body of judicial decisions. The study of the old law of the province as it stood at the date of the Cession has been much facilitated by the two collections published at the expense of the provincial government under the titles of *Edits et Ordonnances* and *Jugements et Delibérations du Conseil Souverain de la Nouvelle France.*

The ground has now been cleared for some consideration of the question how far the legal system of the old French province of Quebec was affected by the change of sovereignty under the Treaty of Paris of 1760 and by the subsequent action of the King of England and the British Parliament. In spite of the century and a half which has passed, the controversy in regard to these matters can hardly be considered as closed. Though most of the points in debate are merely of academic interest there are still some which are of practical consequence in the year 1913.

The first and by far the most important principle applicable to the circumstances is one upon which all parties are agreed. It is a rule of English law that the conquest and annexation of territory by the King of England does not *ipso facto* alter the system of law previously in force in the conquered country, at any rate so far as private rights are concerned. It is not necessary that there should be any official declaration whether by royal proclamation, order in council, or act of parliament, declaring that the former laws are to remain in force. Although nothing of this kind is done the private law is not altered by the fact that the

[6] Symes *v.* Cuvillier (1880) L. R. 5 A. C. 138; Stewart and Molson's Bank *v.* Simpson (1894) R. J. Q. 42 B. 30, *per* Taschereau, *J.*, and authorities there cited; F. P. Walton, Scope and Interpretation of the Civil Code of Lower Canada, *2 et seq.*

country has now become British territory, and if the law is to be changed this must be done subsequently by competent authority. In the great case of *Campbell* v. *Hall*[7] Lord Mansfield reviewed carefully the historical precedents, such as the conquest of parts of France, of Wales and of Ireland, and showed that in no case had conquest *per se* been treated as sufficient to alter the existing legal system. It is in virtue of this rule of law that in many countries over which the British flag floats a system of law different from that of England still remains in operation. It will be enough to mention the Roman-Dutch law which had been carried by the Dutch to South Africa, Ceylon and British Guiana, and the French law of Mauritius and St. Lucia, all of which have survived the transference of these countries to the British Crown. There is no doubt or difficulty, therefore, in admitting that the Cession of Quebec by France to England still left in full operation in the province the Custom of Paris and the old law generally, so far as property and civil rights were concerned. There is, however, an old controversy never completely settled as to whether after the conquest the English law was not introduced into Quebec by a proclamation of King George III and by proclamations of the Governor under a special power. Into this dispute it is unnecessary to enter. Whether or not the English law governed for a few years it is at least certain that in 1774, by the Quebec Act, the French law was reintroduced, if it had ever been abrogated, or was declared to be still in force, if there had never been any valid abrogation.[8]

So far consideration has been confined to private law. When it becomes necessary to deal with the effect of the Cession upon what is called, in a somewhat vague way, "public law," we are upon much more uncertain ground.

There is no doubt that the private law includes among other things the law of personal status, which determines questions of legitimacy, majority, capacity to contract or alienate, marriage, divorce, judicial separation, tutorship and curatory of incapable persons. It includes also the law of property and succession, the modes in which the power to alienate *inter vivos* or by will may legally be exercised, and the extent to which property may be rendered for a time inalienable by creating a "substitution" or other-

[7](1774) 1 Cowper 204.

[8]See F. P. Walton, Scope and Interpretation of the Civil Code of Lower Canada, 7 *et seq.*

wise. Further, the private law regulates the forms of contracts and decides in what cases legal liability may arise without contract. All these are matters which affect the personal rights of citizens *inter se* and do not directly touch the relation between the government and the governed.

On the other hand, it is clear that a change of sovereignty must carry with it an alteration in the rights and duties which exist between the Crown and the subject, or, as it is expressed under many constitutions, between the state and the citizen. In a case arising out of the conquest of the Cape Colony Lord Stowell said:

"I am perfectly aware that it is laid down generally in the authorities referred to that the laws of a conquered country remain till altered by the new authority. * * * But even with respect to the ancient inhabitants no small portion of the ancient law is unavoidably superseded by the revolution of government that has taken place. The allegiance of the subjects and all the law that relates to it—the administration of the law in the sovereign, and appellate jurisdictions—and all the laws connected with the exercise of the sovereign authority must undergo alterations adapted to the change."[9]

To begin with, the constitutional powers of the King of England were by no means the same as those of the King of France, and the rights and liberties of Canadians after the conquest became those which were guaranteed to British subjects by the constitutional laws of England. There were not in Canada any more than in England rights which could not be altered by the legislature. But unless they were so altered they were those enjoyed by Englishmen at home. With these rights were associated correlative duties. This point was raised at the very outset by a claim made naturally enough on behalf of the French in Canada by the Marquis de Vaudreuil in the negotiations between him and General Amherst as to the terms of the capitulation of Montreal. Vaudreuil desired that it should be a condition of the surrender that in the event of war breaking out at a future time between France and England the French in Canada should not be required to take arms against France but the British government should be satisfied if they maintained an exact neutrality. Amherst, though no lawyer, gave a sound and satisfactory answer to this request by saying, "They become subjects of the King," meaning that their rights and duties were to be the same as those of other British subjects. It is possible of course by Act of Parliament to deprive

[9]Ruding *v.* Smith (1821) 2 Hagg. Con. 371, 382.

certain classes of British subjects of rights which other subjects enjoy, and many illustrations, ancient and modern, might be given, such as the exclusion from the franchise of Roman Catholics and Jews in former times, or of Chinese British subjects in British Columbia today. But apart from special legislation the rule is that the rights and duties of British subjects do not depend upon race or creed, or on the fact that some of them are British subjects by birth while others have become so at a later period. No more fatal mistake could have been made at the beginning of British rule in Canada than to lay down the principle that the citizenship of French Canadians was to be in any respect different from that of their fellow-subjects.

Further, as the powers of the new sovereign are, in consequence of the conquest, substituted for those of the former ruler, so it must be with all the officials who exercise an authority delegated by the head of the state. A change of sovereignty necessarily involves the downfall of one official hierarchy and the setting up of another. All courts, criminal, civil, or ecclesiastical, which belonged to the old order are *ipso facto* dissolved by the removal of the sovereign from whom they derived their power, and the powers and prerogatives of the new courts which are established will, so far as not specially determined by the administrative or legislative acts creating them, be those which are given by the constitutional law of the conquering state. It is on this principle that the Superior Court has been held to have jurisdiction to quash a municipal by-law, because such a power is inherent in the courts of superior jurisdiction under the English law.[10] So also the rules of English law determine in Quebec the conditions under which the writs of mandamus, prohibition or quo warranto will issue against officials or public bodies. Mandamus for example will not issue to compel an official or a public body to act in a certain way or refrain from acting if there was a discretion to be exercised by the authority whom it is sought to coerce.[11] The power of a court to punish for "contempt" is governed by English rules, and so is the degree of authority which courts of civil jurisdiction are bound to allow to the decisions of criminal courts.[12]

Again, the important doctrine of English law that the Crown

[10]Regina *v.* Waterous Engine Works Co. (1893) R. J. Q. 32. B. 235.

[11]Collége des Médicins *v.* Pavlides (1892) R. J. Q. 1Q B. 405; Gourdeau *v.* Cité de Québec (1911) R. J. Q. 40 S. C. 388.

[12]Fournier *v.* Att. Gen. (1910) R. J. Q. 19 K. B. 431; City of Montreal *v.* Lacroix (1909) 19 K. B. 385.

can only be sued by its own consent and upon a petition of right, and that this remedy is not available when the claim is based on tort, is part of the public law. It is true that in Canada an important exception to this rule has been made by the statute under which the Crown is made liable for death or injury to the person or to property on any public work resulting from the negligence of any officer or servant of the Crown while acting within the scope of his employment.[13] Public works, such as railways and canals, are in Canada operated by the government to a far greater extent than in England, and it would be inequitable to allow the Crown a complete exemption from liability in such cases of negligence.

But though the powers and prerogatives belong to the public law so far as rights of government are concerned, there are some rights which the sovereign enjoys which depend upon the private law of the province. For example, the question whether the Crown as a creditor has a privilege over other creditors, and if so to what extent, is one which falls to be decided by the law of Quebec and not by that of England.

Perhaps the most important class of cases in which the public law of England differs from that of France is that in which actions are brought against public officers for alleged wrongful acts done in their official capacity. It is a fundamental principle of English law that if an official wrongs a private person he is accountable like anybody else to the ordinary courts, and it is no defence that he acted in good faith or in obedience to the order of his official superior. By the law of France or Germany, as by that of most if not of all of the legal systems of continental Europe, very different ideas on this subject prevail. The moment an act is official the jurisdiction of the ordinary courts to decide as to its wrongfulness or otherwise is completely ousted. Any claim based upon it must be brought before a special tribunal mainly composed of officials and naturally inclined to look with a lenient eye on the acts of government servants. Under our system if there is any bias it is generally against the official, and experience shows that juries are by no means averse to giving heavy damages against an officer of the government who has abused his authority and interfered with the freedom of the lieges. Under the French system it is, on the other hand, extremely difficult to get any remedy by legal process

[13]Rev. Stat. Can. (1906) c. 140 s.20 c. See Letourneux *v.* The King (1903) 33 Can. S. C. R. 335.

against wrongs of this kind. A special court exists, called the *Tribunal des Conflits,* whose sole function is to determine whether the act complained of was done by the officer in the real or mistaken exercise of his duties, in which case it is an official act, or if it was entirely unconnected with his functions and therefore an example of *faute personnelle.* In many cases, if the decision of the *Tribunal des Conflits* is that the act was an official one, the complainant does not think it worth while to carry the case further.[14] In Quebec it does not seem to have been doubted from the beginning that in regard to this matter English rules were to prevail, and actions of damages against public officials of all grades for wrongful exercise of their authority are perfectly familiar.

There are however certain classes of cases in which more difficulty is found in determining the preliminary question, whether they belong to the sphere of public law. For example, when a newspaper is sued for libel is the defence of fair comment upon a matter of public interest a valid defence in the courts of Quebec as being the rule of English law, whether the French law is the same or not? There are a number of *dicta* of learned judges to this effect on the ground that the degree of liberty granted to the press is a matter of public law.

Similarly, opinions have been expressed that all questions which concern the relation of the subject to the administration of justice belong to the public law. If this general rule is well-founded it would cover actions for libel based upon injurious language used in pleadings or by a witness in the box, and actions for false arrest or malicious prosecution. The tendency of recent cases, however, is against regarding such matters as part of the public law, but the point can hardly as yet be considered as finally settled.[15]

Unfortunately, very little can be found in the reports of English decisions or in works of authority upon the distinction between public and private law. This is not surprising because in the English courts nothing turns on the distinction. The judges have to apply the law and whether it is public or private makes no difference. In Quebec where the distinction is capital, because upon

[14]See Dareste, La Justice Administrative en France (2nd ed.) esp. 515 *et seq;* Pandectes Françaises, *s. v.* Autorité Administrative n. 8 and n. 215; *Ibid. s. v.* Conflits, n. 57 and n. 684.

[15]C. P. R. *v.* Waller (1911) 1 Dom. Law Rep. 47 (C. A.); Carrington *v.* Russell (1912) R. J. Q. 42 S. C. 71.

it depends whether the case is to be governed by English or by French law, the authorities are so far very meagre. Judges, not unnaturally, are disposed to follow the line of least resistance and to shirk the difficulty where that it possible by saying that in the case before them there would be no difference between the English and the French law.

The commercial law has been referred to earlier in this article as standing in a somewhat different position from the general body of private law. Among laymen there is a popular misapprehension that the commercial law of Quebec is English. As a statement of principle this would not be accepted by lawyers, but it is less wide of the mark than might at first appear.

As early as 1785 a statute was passed introducing the English rules of evidence in commercial matters.[16] Subject to the familiar exceptions admitted in England, parol testimony was to be sufficient to prove commercial contracts.

After the Cession the commerce of the country, and more particularly the foreign trade, fell mainly into the hands of the English speaking part of the community. Their business was principally with England, with the United States, or with the other provinces of Canada, and all of these countries were governed by the English law. It was natural therefore that English commercial usages should become more familiar than French, and that in the courts great deference should be paid to the decisions of English judges who had explained the English usages. At the same time some of the French ordinances, and particularly the so-called *Code de la Marine* of 1681 were not without great influence. It must not be forgotten that English commercial law in its present shape is mainly the creation of the eighteenth century, and is to a large extent the work of Lord Mansfield and other judges who applied in practice and elevated to the rank of rules of law the customs of merchants and the theories about these customs, formulated by civilians, mostly French or Dutch. What is called the English commercial law is by no means wholly of English origin, and it differs widely in this respect from much of the common law which strikes its roots deep down in English soil. The commercial law, like the Roman *jus gentium,* is an eclectic system, consisting of rules which, being grounded on principles of natural equity and for the most part consecrated by long practice among traders, can without hardship be made to apply to the transactions between men

[16] 25 Geo. III c. 25; 10 Consol. Stat. Lower Can. c. 82, s. 17.

who reside in different countries and are governed in other matters by different laws. Both the English judge and the Roman praetor framed many such rules in cases in which no foreign party was concerned, but in the mind of both there was the more or less conscious intention to lay down principles suitable to be applied in questions between traders, whatever might be their respective nationalities. The fact that the commercial law as applied in England was itself taken to no small extent from French sources no doubt helped to ensure it a favourable reception in Quebec.

The commissioners who drafted the Civil Code of Lower Canada state very clearly the difference between the commercial law and the civil law of the province in regard to their origin. They say:

"In a few instances the rules of the commercial law may be found in the statute book or in the ordinances of France, but much of it is to be sought in usages and jurisprudence. Our system, if system it may be called, has been borrowed without much discrimination, partly from France and partly from England; it has grown up by a sort of tacit usage and recognition, without any orderly design or arrangement, and has not as yet received any well-defined or symmetrical form from the decisions of our courts."

The codifiers might have thought that the time had come to try to give the commercial law this symmetrical form, but they evidently shrank from the task and rather excused the very meagre outline which they give of it by saying:

"Much of what has been established by usage may more safely be left to be interpreted in like manner and to be modified as new combinations and experience of new wants may suggest."[17]

In speaking of the commercial law of the Province of Quebec it is important to notice that in the arguments before the courts English and American cases and cases decided in the other provinces of Canada are constantly cited. Although such cases are referred to not as authorities binding upon the court but as illustrations of the applications of similar rules, it is an undoubted fact that the practice of looking to them for guidance tends strongly in the direction of assimilation. The fact also that the majority of the judges of the Supreme Court and of the Judicial Committee of the Privy Council have been trained in the common law cannot fail to exercise some influence. In cases, for example, where the

[17]Commissioners' Reports, v. 3 p. 214.

French authorities are conflicting, and the rule in Quebec is not settled, any court with a composition like that of the Supreme Court or the Judicial Committee must have an inclination to hold that the law of Quebec does not differ from that of the other provinces.

Upon such a question for example, as whether a contract is complete when an acceptance has been made, or if, on the other hand, it remains incomplete until the offerer has received notice of the acceptance—a question never finally settled in France—the Supreme Court naturally adopted the former theory, which is in accordance with the law of England and Ontario.[18] Even those who are most jealous to preserve the purity of the civil law of Quebec can hardly regret that in regard to rules of this kind some weight should be given to the advantage of having the same rule for the whole of Canada. In commercial matters, at any rate, it is safe to affirm that a gradual assimilation of the law of Quebec to that of the rest of Canada has long been going on and is now fairly complete.

It is not necessary in this place to do more than indicate in a very general way the subjects which have been withdrawn from the control of the provinces and handed over to the Dominion Parliament. The consideration of the respective spheres of the Parliament of Canada and the Legislatures of the Provinces belongs to the Constitutional Law and will not be treated in this article.

Broadly speaking, the intention was to leave to each province its complete autonomy in regard to matters which did not affect persons outside its limits, and to transfer to the Dominion the control of those matters which affected the Dominion generally, or, at least, two or more of the provinces. Applying this canon no difficulty arises in regard to the Postal Service, the Census, the Military and Naval Services, Shipping, Quarantine, Currency, Bills of Exchange, Interest, Patents and Copyrights, Weights and Measures, the Criminal Law, the Law of Naturalisation, and the laws relating to Indians. These are all of them matters which plainly affect the Dominion as a whole. And it is equally clear that the Railways, Ferries, Canals, Telegraphs, and other works, which extend beyond the limits of a province or connect one province with another, could not be provincial matters. In regard to

[18] Magann *v.* Auger (1901) 31 Can. S. C. R. 186. *Cf.* Toulouse (13 juin, 1901) Dall. Pér. 1902. 2. 15.

two of the transferred subjects, namely, Banks and Fisheries, there might, but for the express language of the Act, have been room for doubt, but it was felt to be desirable to place the financial system of the country and the fisheries, whether on the sea coast or inland, under a single control, and therefore the legislation in regard to these matters was placed under the federal jurisdiction. In the case of the fisheries in waters belonging to the Crown, the transfer of legislative authority did not affect the right of property enjoyed by the government of the provinces as representing the Crown.

Provision was also made for the case of works which, although wholly situate within a province, might be upon such a scale or of such a character as to justify their being regarded as Dominion matters, and it was enacted that such works, either before or after their execution, might be declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

Over the works and undertakings which are not confined within provincial boundaries, or, if so confined, have been declared to be of general advantage, the Parliament of Canada has exclusive authority, and it is in virtue of this power that the great railways, telegraphs, telephones, and express companies are regulated by Canadian laws and are placed under the control of the Railway Commission. The Commission under its delegated authority can determine what conditions shall be inserted in bills of lading or other contracts necessary for these businesses, and to what extent the companies may limit their liability.

Up to this point the distribution of legislative powers is sufficiently clear, but there are certain of the transferred subjects which have not yet been mentioned in regard to which serious doubts have been felt. In spite of the very considerable number of cases which have been decided upon some of them, there are still many points of general importance which remain doubtful.

The Dominion Parliament was given exclusive legislative authority as to the "regulation of trade and commerce." By giving these words a wide interpretation the whole of the commercial law might have been placed under the control of the Dominion; but a much more restricted meaning has been given to them by the courts. It has been held by the Privy Council that the words must be taken to mean the power to make political arrangements in regard to trade, and regulations as to trade in matters of inter-

provincial concern, and perhaps general regulations affecting the whole Dominion. But a law, for example, that certain clauses should be implied in all policies of fire insurance issued in a province is within the provincial power, and is not such a regulation of trade as is competent only to the Dominion.[19]

It is under its power to regulate trade and commerce that the federal parliament passes such general measures as the Insurance Act, the Trades Union Acts, the Alien Labour Act, the acts for the inspection and standardisation of wheat and some other staples, the laws to prevent the adulteration of food and many others. In regard to some of the provisions in the Insurance Act and in some of the other acts passed under this power it is by no means certain that the federal parliament has not invaded the provincial field.

Again, the province has power to incorporate companies *with provincial objects.*

But what limitation is intended to be created by the words in italics? Does it mean that companies incorporated by a provincial legislature must confine their business within the province which has given them a legal status? Upon this view an insurance company incorporated by a province would be debarred from taking risks outside that province. The great division of opinion among the judges of the Supreme Court shows how hard it is to give an intelligible meaning to the words "with provincial objects," as determining a class of companies, and until a decision of the Privy Council has been obtained, the point will remain doubtful.[20]

Further, the province has exclusive power to legislate as to the solemnisation of marriage in the province, while the Dominion has a similar power with regard to marriage and divorce. How is it possible to reconcile the two powers? If, for example, the province enacts that the marriage of two Roman Catholics shall not be valid unless celebrated by the proper priest of their church, is this legislation which transcends solemnisation and, by affecting the validity of the marriage, invades the sphere of Dominion legislation? Must laws dealing with solemnisation be limited to laying down regulations as to banns, licenses, officiating persons, and the like, and imposing penalties for breach of such regulations, but always subject to the limitation that the marriage itself shall not be annulled if celebrated by any marriage officer? This contention

[19]Citizen's Insurance Co. *v.* Parsons (1881) L. R. 7 A. C. 96.

[20]C. P. R. 7 *v.* Ottawa Fire Insur. Co. (1907) 39 S. C. R. 405.

has recently been rejected by the Privy Council, and it has been held that under the provincial law it may be a condition of the validity of the marriage that it should be performed by the priest or minister of the religion of the parties or one of them, though in the opinion of the Supreme Court this condition has not yet been imposed.[21] These examples may serve to illustrate the difficulties of interpreting the sections of the British North America Act which contain the distribution of legislative powers.

Under the Canadian constitution the whole field of legislative power is divided between the federal and provincial parliaments. If the enactment is one which is to take effect within Canadian territory the power to pass it must reside either with the Dominion Parliament or with the provincial legislature. The only exception to which this statement is subject is the very rare case of the Act which has been passed being one which conflicts with an imperial statute dealing with the same matter and applying to Canada.[22]

There is not any written constitution for the Dominion, or for the separate provinces by which certain subjects are withdrawn from the legislative jurisdiction. This creates an important difference between our constitution and that of the United States. An American law may be held to be invalid because it is contrary to the constitution of the United States, or, in the case of a state law, because it is contrary either to the constitution of the United States or to that of the state in which it was passed. Thus, for example, Workmen's Compensation Acts have been held invalid on the ground that to make the employer liable without proof of fault was such a taking away of property without process of law as was forbidden by the constitution.[23] Under our system this would be impossible, not because the courts have less power than those of the United States, but because there is no constitution which restricts the freedom of the legislatures. If the province has authority to pass laws dealing with the relation of employer and employed, any legislation which it passes, however revolutionary in character, is perfectly valid. The constitutional doctrine of the sovereignty of parliament is as applicable to the provincial

[21] *In re* Marriage Laws (1912) 46 Can. S. C. R. 132.2. *In re* Marriage Legislation in Canada. [1912] 1 A. C. 880. The Privy Council found it unnecessary to express an opinion on the second point. Their judgment is not yet reported.

[22] Att. Gen. for Ont. *v.* Att. Gen. for Can. L. R. [1912] A. C. 571.

[23] See Ives *v.* South Buffalo Ry. Co. (1911) 201 N. Y. 271 and article of Prof. Wambaugh in 25 Harv. L. Rev. 129.

legislatures as to the parliament of the Dominion, or even to the Imperial Parliament, provided always that the province was dealing with a subject included in the field of legislation assigned to it.[24]

This principle is in no way affected by the administrative veto, a power in any case very sparingly exercised.

No description of the legal system of Quebec can be at all complete without some notice of the important difference which exists between that system and the English law in regard to the authority of judicial decisions.

Without attempting to state fully the English rules on the subject, it may be said that the judgments of a higher court, by which a point of law is decided, are binding upon all courts of inferior jurisdiction when the point which has been so decided comes up before them in a subsequent case, and that the higher court itself is bound to follow its own previous decision. As Gulliver rather cruelly expressed it "If once judges go wrong they make it a rule never to come right."

All the systems of law based on that of Rome start with a principle fundamentally opposed to this. *Non exemplis sed legibus judicandum est.* President de Thou, speaking of the French law, says *Les arrêts sont bons pour ceux qui les obtiennent, il faut se garder de les invoquer comme une autorité décisive.*

English and American judges regularly support their opinions by reference to previous decisions, whereas in France a judge is not allowed to give a previous case as one of the *motifs* of his judgment. The courts of Quebec follow in principle the French and not the English rule in regard to the value of precedents, though, perhaps owing to English example and to the attitude of mind of judges of the Supreme Court and of the Privy Council, previous judgments are treated with more respect in Quebec than is the case in France. In a recent case in Quebec the rule was thus stated by Cross, *J:*

"The binding authority of precedents is characteristic of English law. With us the Code is the law whilst decisions are particular applications of the law."[25]

The English system undoubtedly leads to an occasional miscarriage of justice. The court decides a question in a certain sense, not because it is convinced that this is the correct view, but because

[24]See Beardmore *v.* City of Toronto (1910) 21 Ont. L. R. 505.

[25]Le Procureur Géneral de la Province de Québec *v.* Maclaren (1911) R. J. Q. 21 K. B. 42, 58.

the point has been so decided by another court. A volume might be compiled of "Cases reluctantly followed." In rare instances the legislature may take action but a remedial statute will rarely, if ever, be retroactive, and the defeated litigant has to be content with the satisfaction of knowing that the injustice done to him has led to a legal reform.

On the other hand the English system has the virtue of greater certainty. It is possible to predict with more confidence in what sense a point will be decided, and lawyers and men of business can make their arrangements accordingly. If the French theory were carried to the logical extreme every judge would be free to give his own interpretation of the law, and previous judgments would afford no guide. The judgments of the higher courts would not necessarily carry any weight with courts of inferior jurisdiction. But, apart from the fact, that a court of appeal which has decided a legal question is not likely within a short time to decide it in the opposite sense even though perfectly free to do so, the courts of appeal recognise that it is their duty to settle the law so far as they can. This being so, inferior courts are not disposed to give decisions which they know will be reversed on appeal if the case goes further, or, in unappealable cases to incur the suspicion of bias by giving a decision contrary to the known views of the higher court. The result is that both in France and in Quebec, and indeed in all countries where a civil law system prevails, a working compromise is arrived at, that where there is a "jurisprudence" upon a certain point this is not to be disturbed unless it be by a court of higher jurisdiction than the courts which created the "jurisprudence." And "jurisprudence" is defined as "the habit of the judges to decide or interpret a question in a well-defined sense."

In Quebec, it is admitted that an inferior court may decline to follow one judgment or even two judgments of a superior court in order to give that court an opportunity to reconsider the matter. When, however, a superior court has on several occasions reached the same conclusion there is a settled jurisprudence which ought to be followed both by that court itself and by all courts of inferior jurisdiction.[26]

Where the courts which pronounced the judgments relied upon were themselves divided in opinion it will be more easy to reach the conclusion that the jurisprudence is not settled.

[26]See Guertin *v.* Molleur (1902) R. J. Q. 21 S. C. 261.

In principle it would appear that the Supreme Court of Canada in cases from the province of Quebec has the same freedom in regard to previous decisions as the courts of the province. The composition however of that court, consisting as it does of five judges trained in the common law and two only from the Province of Quebec, inclines it to take a stricter view of the binding character of precedents. But, though the Supreme Court will very rarely overrule a previous decision of its own, it is not absolutely bound to follow it, in the sense in which the Court of Appeal or the House of Lords in England would be bound in similar circumstances.[27]

[27]See Desormeaux *v.* Ste. Therese (1910) 43 Can. S. C. R. 82; Shawinigan Hydro Co. v. Shawinigan Water Co. (1910) 43 Can. S. C. R. 650.

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